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IN THE
COURT OF APPEALS OF INDIANA

RILEY NELSON FOWLER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 32A01-0705-CV-202
	)	
KATHERINE M. SCHWEITZER,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable David H. Coleman, Judge
Cause No. 32D02-0606-CT-18

November 5, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff Riley Nelson Fowler appeals the trial court's exclusion of certain digital motion x-ray (DMX) evidence from the jury trial that was held regarding his personal injury claim against appellee-defendant Katherine M. Schweitzer for injuries that he sustained in an automobile accident. Specifically, Fowler claims that the trial court abused its discretion in excluding this evidence because it failed to properly apply the provisions of Indiana Rule of Evidence 702(b) in making its ruling. Finding no error, we affirm the judgment of the trial court.

FACTS

On December 19, 2002, Fowler was operating his vehicle in congested traffic on Interstate 70 near the Plainfield exit. At some point, he was rear-ended by an automobile that Schweitzer was driving. As a result of the collision, Fowler's vehicle was damaged and he sustained cervical strain injuries. The following day, Fowler saw his physician and obtained a prescription for pain medication. While Fowler had a history of chronic neck and back pain, he believed that the pain he experienced after the accident "was different." Appellant's Br. p. 6; Appellant's App. p. 31.

Nearly two years after the accident, Dr. Gary Fuller, a chiropractor, performed DMX on Fowler's cervical spine in an effort to diagnose the cause of Fowler's persistent pain. Although the DMX process is similar to typical x-rays, DMXs take thirty images per second over a short period of time. The x-rays are then placed on a DVD and the chiropractor can view the bones in motion for the purpose of diagnosis and treatment.

On December 10, 2004, Fowler filed a complaint against Schweitzer, seeking damages for the injuries that he sustained in the collision. On August 22, 2005, Schweitzer filed a motion in limine to exclude all DMX evidence from being presented to the jury, as well as Dr. Fuller's testimony relating to that process. In part, Schweitzer maintained that DMXs are experimental and present an "unreliable form of diagnostic testing that fails to comport with Daubert requirements." Appellant's App. p. 13. Schweitzer also asserted that the DMX process "is not capable of visualizing ligaments or other soft tissue, and it is impossible to actually see soft tissue damage." Id.

On September 11, 2006, a hearing was held on Schweitzer's motion in limine. Fowler claimed that the DMX process "is acceptable and accepted in the medical . . . and scientific community." Tr. p. 4. After hearing the arguments, the trial court determined that the issue was whether DMXs are accepted in the medical community. Specifically, the trial court commented that

> [the] judge's gatekeeping function applies to all expert testimony not just the scientific . . . testimony. So what you've told me Dr. Fuller, uh, maybe would not have the knowledge to testify concerning the Digital Motion X-Ray itself, the scientific basis for that. He's basing his information on I guess hearsay from this other doctor. So I think the other doctor would have to be the one that would – if he's the expert to come and testify and be subject to cross-examination concerning the scientific principle and the fact that it's been subjected to peer review. So I guess the long and the short of it is I'm going to deny the request for Dr. Fuller to testify based on what you've told me. And I think the – he would not be the proper person concerning the scientific principle behind the Digital Motion X-Ray.

Id. at 12. Thereafter, the trial court issued an order in limine excluding "any evidence, or any reference whatsoever by Plaintiff or Plaintiff's expert witnesses, either in testimony or by

physical exhibits, to video fluoroscopy, dynamic motion x-ray or motion x-ray." Appellant's App. p. 18.

At the jury trial that commenced on March 21, 2007, Fowler made an offer of proof regarding Dr. Fuller's proposed DMX testimony. Although Fowler indicated that he would "incorporate the prior memorandums" that were filed, he did not present any specific evidence as to what Dr. Fuller's testimony would have been regarding this process or the results of Dr. Fuller's review of the DMX films. Tr. p. 202-03. The trial court denied the offer of proof and prevented Dr. Fuller from testifying regarding the DMX. Following the presentation of evidence, the jury returned a verdict for Fowler in the amount of $720.[1] Fowler now appeals.

DISCUSSION AND DECISION

I. Standard of Review

In deciding whether the trial court properly excluded the DMX evidence, we initially observe that the admission and exclusion of evidence falls within the sound discretion of the trial court and the trial court's decision is reviewed only for an abuse of discretion. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Meister v. State, 864 N.E.2d 1137, 1142 (Ind. Ct. App. 2007), trans. denied.

As a threshold matter, Schweitzer claims that Fowler has not preserved the issue of the exclusion of Dr. Fuller's testimony regarding the DMX process because Schweitzer believes Fowler did not make a proper offer of proof. It is well settled that an offer of proof is

required to preserve an error in the exclusion of a witness's testimony. Dylak v. State, 850 N.E.2d 401, 408 (Ind. Ct. App. 2006), trans. denied; Ind. Evidence Rule 103(a)(2).[2] The purpose of an offer of proof is to convey the point of the witness's testimony and provide the trial judge the opportunity to reconsider the evidentiary ruling. Baker v. State, 750 N.E.2d 781, 785-86 (Ind. 2001). Equally important, an offer of proof preserves the issue for review by the appellate court. Id. To accomplish these two purposes, an offer of proof must be sufficiently specific to allow the trial court to determine whether the evidence is admissible and to allow an appellate court to review the correctness of the trial court's ruling and whether any error was prejudicial. Id. An offer of proof consists of three parts: (1) the substance of the evidence, (2) an explanation of its relevance, and (3) the proposed grounds for its admissibility. Roach v. State, 695 N.E.2d 934, 939 (Ind. 1998).

In this case, Fowler failed to show at the hearing on the motion in limine, during the offer of proof, or in the written memoranda, what Dr. Fuller's proposed testimony would establish with regard to the DMX evidence. Hence, Fowler waived his claim of error.

Waiver notwithstanding, we note that Fowler maintains that the trial court applied the "wrong law" in deciding to exclude Dr. Fuller's testimony regarding the DMX process.

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[1] The jury award totaled $800, with a finding that Schweitzer was 90% at fault. Appellant's App. p. 7.

[2] This rule provides that

> Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.

Evid. R. 103(a)(2).

Appellant's Br. p. 6. In essence, Fowler argues that the trial court failed to consider the provisions of Indiana Rule 702 in determining the admissibility of the evidence.

In support of his claim, Fowler directs us to Sears Roebuck and Co. v. Manuilov, 742 N.E.2d 453 (Ind. 2001), in which our Supreme Court held that prior to the adoption of Indiana Evidence Rule 702, Indiana courts applied the Frye[3] test which "determined the admissibility of novel scientific evidence based upon its general acceptance in the scientific community." Id. at 460. Moreover, our Supreme Court in Sears determined that federal court opinions interpreting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), which was the purported "liberalizing of the Frye rule," are not binding on Indiana courts in deciding evidentiary issues. Sears, 742 N.E.2d at 460-61. As a result, Fowler urges that the trial court should have admitted the DMX evidence in accordance with Indiana Evidence Rule 702(a), which provides that

> [I]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Indiana Evidence Rule 702(b) provides that "expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."

Our Supreme Court has interpreted Indiana Evidence Rule 702 to be broader than the Frye test because it "permits trial courts to consider factors other than general acceptance and

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[3] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

thus may permit expert testimony in new, innovative areas even though general acceptance may not yet have been achieved but which are otherwise found to be based on reliable scientific principles." Sears, 742 N.E.2d at 460. Hence, the adoption of Evidence Rule 702 reflects "an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence" and the adoption of this rule was not intended to interpose an unnecessarily burdensome procedure or methodology for trial courts. Id. at 461. Moreover, contrary to Fowler's contentions, our courts have adopted some of the more liberal considerations set forth in Daubert in determining reliability. By the same token, this court has observed that there is "no specific test or set of prongs that must be considered" in order to satisfy Indiana Evidence Rule 702. Ford Motor Co. v. Ammerman, 705 N.E.2d 539, 551 (Ind. Ct. App. 1999). Indeed, in McGrew v. State, 682 N.E.2d 1289, 1290 (Ind. 1997), our Supreme Court observed that "reliability may be established by judicial notice or by sufficient foundation to convince the trial court that the relevant scientific principles are reliable."

In this case, the record shows that after Schweitzer filed her motion in limine, she submitted an additional memorandum that attached an opinion of Dr. Karen Caldemeyer, a neuroradiologist. Appellee's App. p. 1-3. Dr. Caldemeyer averred that: a) as a board certified neuroradiologist, she does not use DMX, nor do others in her community; b) DMXs are essentially "freeze frames," which makes them no more valuable than static films; d) DMX does not allow direct visualization of soft tissues or ligaments and cannot determine effect upon nerve roots; and e) DMX cannot distinguish degenerative changes from post-traumatic ligamentous changes. Id. at 2, 3.

Fowler did not present any admissible evidence contradicting Dr. Caldemeyer's assertions. Thus, it is apparent that the trial court was not convinced that the relevant scientific principles of DMX are reliable. See McGrew, 682 N.E.2d at 1290. And, with respect to Fowler's claim that the trial court applied the incorrect standard in excluding Dr. Fuller's testimony about the DMX evidence, it is apparent that its comment that the question involved a "Daubert" issue was simply a generalized framing of the issue—just as Schweitzer characterized her motion in limine as a "Daubert motion." Appellant's App. p. 12. Moreover, Schewitzer's memorandum in support of the motion in limine specifically discussed the applicability of Indiana Rule of Evidence 702(b) to the issue. Appellee's App. p. 3; Appellant's App. p. 13.

In conclusion, Fowler has failed to show that the trial court misapplied the law in determining that Dr. Fuller's testimony and other evidence relating to the DMX process should have been excluded. Thus, there was no error.

The judgment of the trial court is affirmed.

MAY, J., and CRONE, J., concur.